

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re BRIAN W., a Person Coming Under
the Juvenile Court Law.

B227635
(Los Angeles County
Super. Ct. No. CK64692)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.W.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Donna Levin, Referee. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Deborah L. Hale, Principal Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

R.W., mother, appeals from the juvenile court's order terminating her parental rights to nearly two-year-old Brian W. Mother contends that the juvenile court denied her due process when it denied her request to set the matter for a contested selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26¹ and that the juvenile court erred by failing to find the parental visitation exception to the termination of parental rights under section 366.26, subdivision (c)(1)(B)(i) (section 366.26(c)(1)(B)(i)). We affirm.

BACKGROUND

Mother, then 17 years old, gave birth to Brian while incarcerated in juvenile hall on a battery charge. After Brian's birth, mother arranged for Jacqueline W., mother's former foster mother, to care for Brian. Jacqueline also cared for three foster children, ages 11 years, two years, and three months. On August 7, 2009, the Los Angeles County Department of Children and Family Services (Department) removed Brian from Jacqueline's care after it received a referral that alleged that Jacqueline had left Brian, then age two months, and the three foster children without adult supervision while she went shopping. Brian was placed with foster mother, Robin A.

On August 12, 2009, the Department filed a petition under section 300, subdivisions (b) and (g) alleging that mother was incarcerated and failed to make an appropriate plan for Brian's care because she placed Brian with Jacqueline, an unrelated adult, who left Brian at home without adult supervision. At the August 12, 2009, detention hearing, the juvenile court found that the Department had established a prima facie case that Brian was a person described by section 300, subdivisions (b) and (g) and ordered Brian detained. The juvenile court ordered that mother was to have monitored visits with Brian three times per week.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

The Department filed first and second amended section 300 petitions on August 14, 2009, and September 10, 2009, respectively. The second amended petition added an allegation that mother was unable to care for Brian due to mental and emotional problems that included bipolar disorder, depression, and assaultive behavior. The petition alleged that mother had been hospitalized involuntarily for the evaluation and treatment of her psychiatric condition, that mother had threatened to harm herself and others, that mother had refused to take medication, and that mother had two recent arrests for battery. The petition further alleged that Brian's then three-year-old sister, A.W., received permanent placement services due to mother's mental and emotional problems and assaultive behavior.

The Department's September 10, 2009, Jurisdiction/Disposition Report states that mother had a prior dependency case concerning A.W., that mother's parental rights to A.W. were terminated, and that A.W. was adopted. Mother identified "Davion" as one of Brian's possible fathers. Mother did not know Davion's last name or date of birth or the identity of any of Davion's family members or friends. Mother believed that Davion was incarcerated, but did not know where. Mother did not know the names of Brian's other possible fathers.

The report states that mother had a history of mental and emotional problems and had been hospitalized many times. Mother's probation officer reported that mother likely would be placed in a six month program, but that it was unlikely she would be placed in a program that would allow Brian to live with her due to her previous assaultive behavior in two such placements with A.W. The report states that there was no evidence that suggested that mother had resolved any of her "prior issues" or that she was emotionally and/or mentally stable. The Department recommended that Brian be suitably placed in foster care and that mother be denied family reunification services.

In an Information for Court Officer filed on October 29, 2009, the Department informed the juvenile court that mother had been released from juvenile hall and placed

in Penny Lane, a group home.² Mother reportedly had been participating in a “Baby and Me” program. Brian’s foster mother was reportedly willing to adopt Brian or to participate in reunification if ordered by the juvenile court. At a hearing on October 29, 2009, mother’s counsel noted that mother and Brian had had three visits and requested an order that mother receive a three-hour visit on Sundays and a two-hour visit during the week on a day to be worked out. The juvenile court granted the request.

In an Information for Court Officer filed on November 10, 2009, the Department informed the juvenile court that mother had visited with Brian for one hour on October 3 and October 17, 2009, and for two hours on November 1, 2009. A visit was scheduled for November 8, 2009. Mother was reported to be participating in group and self-expression therapy and about to start individual therapy. Mother was taking medication for depression. Mother’s deputy probation officer informed mother’s social worker that mother’s behavior at Penny Lane had deteriorated. Mother was “starting to be disrespectful and cross inappropriate boundaries.” Mother had been in fights with staff members and peers.

At the November 12, 2009, adjudication hearing, mother entered a plea of no contest. The juvenile court dismissed the allegation under section 300, subdivision (b) concerning mother’s incarceration and failure to make an appropriate plan for Brian’s care and sustained the petition as otherwise amended, declaring Brian to be a dependent child as described in section 300, subdivisions (b) and (g). The juvenile court ordered the Department to provide mother with family reunification services. Mother was to attend parent education classes and individual counseling to address case and mental health issues. Mother was to comply with anger management, her psychotropic medication regimen, and the conditions of her probation. The juvenile court ordered that mother and Brian were to have three weekly monitored visits. Each visit was to last a minimum of

²

A subsequent Information for Court Officer informed the juvenile court that mother had been released because her case was dismissed.

three hours. The juvenile court set the matter for a six month review hearing on May 13, 2010.

The Department's May 13, 2010, Status Review Report states that on November 27, 2009, mother left her placement without permission and a bench warrant was issued. On January 5, 2010, mother was picked up on the bench warrant. On January 19, 2010, mother was placed in Camp Joseph Scott. Mother enrolled in programs at the camp including a "Mommy and Me" class. Shortly after her placement in Camp Joseph Scott, mother was removed from the camp because she attacked a staff member and posed a danger to herself and others. Mother was taken to Olive View Hospital where she was medically and psychiatrically cleared for release back to probation. Mother informed her social worker that she was at Gateways Hospital and Mental Health Center (Gateways).

On February 2, 2010, after receiving treatment at Gateways, mother was discharged and sent to Central Juvenile Hall. Mother remained at Central Juvenile Hall for two weeks. Initially mother did well at Central Juvenile Hall, but her behavior worsened. Mother got into a physical altercation with staff, pulling a staff member's hair. Mother had to be restrained. Because mother failed to comply with the program at Central Juvenile Hall, she was transferred to Sylmar Juvenile Hall.

Mother's behavior at Sylmar Juvenile Hall was "positive and consistent." Mother complied with many of the services the facility provided. Mother's visitation with Brian was described as "consistent and worthwhile" due to mother's behavior and cooperation. On two occasions, mother was provoked by another juvenile in the facility and responded appropriately by ignoring the juvenile.

According to the Department's Status Review Report, Brian was placed on February 9, 2010, with prospective adoptive parents Mr. S and his spouse Mr. D after mother got into a verbal altercation with Brian's caregiver, Robin, which caused unmanageable tension between mother and Robin. After his placement with Mr. S and Mr. D, Brian was reported to be in a caring and loving home and receiving daily care, supervision, and attention. Brian was very active with his caregivers and responded well

to their care and direction. Brian appeared to be well cared for and happy, and was thriving and healthy.

On April 26, 2010, mother was released from juvenile hall and placed with Assessment Intervention Resources. Within hours of her placement, mother left without permission. Mother later called her social worker to inquire about Brian, but did not inform the social worker of her location or telephone number. On May 10, 2010, mother requested that a Department social worker schedule a visit with Brian. The Department scheduled a visit for May 12, 2010, but mother did not attend.

Mother was reported to be in partial compliance with the case plan. Mother visited with Brian nine times during the prior six-month period. Mother interacted appropriately with Brian during the visits, holding, nurturing, and caring for him. Mother appeared to love Brian and genuinely to want to care for him. Brian appeared to be comfortable in mother's arms and accepted her care. Because of mother's failure to address successfully her mental health and anger management issues, the Department recommended that family reunification services be terminated.

At the May 13, 2010, six month review hearing, the juvenile court found that mother had not consistently and regularly contacted and visited Brian; had not made significant progress in resolving the problems that led to Brian's removal; and had not demonstrated the capacity and ability to complete the objective of the treatment plan and to provide for Brian's safety, protection, physical and emotional health, and special needs. The juvenile court order terminated mother's family reunification services and set the matter for a section 366.26 hearing on September 8, 2010. Mother was permitted monthly visits with Brian of at least one hour.

The Department's September 8, 2010, section 366.26 report states that Brian was thriving in a safe, stable, and appropriate home where he appeared to be receiving unconditional care and supervision. Brian appeared to be very comfortable and happy with his prospective adoptive parents to whom he responded well and from whom he naturally sought comfort. Brian was reported to be ahead in almost all areas of his

development. The adoptive home study for the prospective adoptive parents had been approved.

According to the report, mother had visits with Brian on June 10, 2010, and July 15, 2010, after the May 13, 2010, six month review hearing. Mother failed to attend a visit with Brian scheduled for August 19, 2010. During this period, mother maintained telephone contact with Brian. Mother's visits with Brian were described as "appropriate" and mother appeared to love and care for her son. The Department recommended that mother's parental rights be terminated.

Mother did not appear at the section 366.26 hearing. In mother's absence, mother's attorney requested the juvenile court to set the matter for a contested hearing concerning the application of the section 366.26(c)(1)(B)(i) exception to the termination of parental rights. The juvenile court asked mother's attorney for an offer of proof. Mother's attorney responded, "If called to testify, mother will testify that she has visited regularly and consistently, that she phone calls the caregiver and talks to the child frequently, almost every week and that she has a bond with the child. I believe the report indicates as well the visitation." The juvenile court denied the requested continuance. The juvenile court found that Brian was adoptable, that it would be detrimental to Brian to be returned to mother, and that no exception to the termination of parental rights applied. Based on its findings, the juvenile court terminated mother's parental rights.

DISCUSSION

I. Contested Selection And Implementation Hearing

Mother contends that the juvenile court erred when it denied her request to set the matter for a contested hearing on the application of the parental visitation exception to the termination of parental rights under section 366.26(c)(1)(B)(i). The juvenile court did not err.

A. *Standard of Review*

There is no clear authority on the standard of review for the denial of a hearing based on an offer of proof in connection with the termination of parental rights. Because a hearing must be granted if the offer of proof sets forth a prima facie case, arguably the standard of review is de novo. Yet there are elements of discretion involved. Without deciding the appropriate standard of review, we hold there is no error under any standard of review.

B. *Application of Relevant Legal Principles*

Once a juvenile court finds that a child is likely to be adopted after removing the child from parental custody and has terminated reunification services, parental rights may be terminated unless the court finds a compelling reason for determining that doing so would be detrimental to the child under certain exceptions set forth in section 366.26, subsection (c)(1). (*In re Celine R.* (2003) 31 Cal.4th 45, 52-54.) The parental visitation exception in section 366.26(c)(1)(B)(i) (formerly section 366.26, subdivision (c)(1)(A)³) provides that parental rights will not be terminated and a child freed for adoption if the parent has “maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship.” (Italics added.) Application of the parental visitation exception consists of a two-prong analysis. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449-450.) The first is whether there has been regular visitation and contact between the parent and child. (*Id.* at p. 450.) The second is whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination. (*Ibid.*)

“[A] parent has a right to ‘due process’ at the hearing under section 366.26 which results in the actual termination of parental rights. This requires, in particular circumstances, a ‘meaningful opportunity to cross-examine and controvert the contents of

³ Section 366.26, subdivision (c)(1)(A) was renumbered 366.26(c)(1)(B)(i) effective January 1, 2008. (Stats.2006, ch. 838, § 52.)

the report.’ [Citations.]” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.) A juvenile court does not violate a parent’s right to due process by requiring the parent to make an offer of proof before the juvenile court holds a contested hearing on the applicability of the parental visitation exception to the termination of parental rights under section 366.26(c)(1)(B)(i)). (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1116.) “A proper offer of proof gives the trial court an opportunity to determine if, in fact, there really is a contested issue of fact. The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued.” (*Id.* at p. 1124.)

Mother contends that her offer of proof was sufficient to require a contested hearing on the parental visitation exception. In response to the juvenile court’s request for an offer of proof, mother’s attorney stated, “If called to testify, mother will testify that she has visited regularly and consistently, that she phone calls the caregiver and talks to the child frequently, almost every week and that she has a bond with the child. I believe the report indicates as well the visitation.”

Assuming without deciding that mother’s offer of proof with respect to the first or visitation and contact prong of the parental visitation exception was sufficient to establish a contested issue of fact, the offer of proof with respect to the second or benefit prong was not. The benefit prong of the parental visitation exception requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination. (*In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 450; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809 [parents bear the burden of establishing the parental visitation exception].) To establish the parental visitation exception, “the parent must show more than ‘frequent and loving contact’ [citation], and be more to the child than a mere ‘friendly visitor or friendly nonparent relative.’ [Citation.]” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) An offer of proof must be specific and set forth the evidence to be produced. (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) Mother’s offer of proof that she “has a bond with the child” was not specific about the nature of mother’s claimed bond with Brian because it failed to

address the strength of mother’s relationship with Brian or explain how the termination of that relationship would be detrimental to Brian. (*In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 450; *In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) Moreover, mother’s offer of proof failed to identify the evidence that mother would produce to establish the claimed bond. (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) Instead, mother’s offer of proof merely identified the issue to be “addressed and argued”— the nature of mother’s relationship with Brian—and thus failed to establish a contested issue of fact. (*Ibid.*) Accordingly, the juvenile court did not err in denying mother’s request to set the matter for a contested hearing.

II. The Parental Visitation Exception To The Termination Of Parental Rights

Mother contends that the juvenile court erred in failing to find the parental visitation exception to the termination of parent rights under section 366.26(c)(1)(B)(i). The juvenile court did not err.

A. Standard of Review

Some courts have held that challenges on appeal to a juvenile court’s determination under section 366.26(c)(1)(B)(i) are governed by a substantial evidence standard of review. (See, e.g., *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 & fn. 4.) Under a substantial evidence standard of review ““the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,” to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.’ [Citation.]” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on other grounds as stated in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) We do not evaluate the

credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.)

Other courts have applied an abuse of discretion standard of review. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351; *In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 449.) Under an abuse of discretion standard of review, we will not disturb the juvenile court's decision unless the juvenile court exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) In this case, we need not decide whether a juvenile court's ruling on the section 366.26(c)(1)(B)(i) exception is reviewed for substantial evidence or abuse of discretion, because, under either standard we affirm the juvenile court's decision.

B. Application of Relevant Legal Principles

As noted above, following a determination that a child is likely to be adopted after the child has been removed from parental custody and reunification services have been terminated, a juvenile court may terminate parental rights unless it finds a compelling reason for determining that doing so would be detrimental to the child under certain exceptions set forth in section 366.26, subsection (c)(1). (*In re Celine R.*, *supra*, 31 Cal.4th at pp. 52-54.) "The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*Id.* at p. 53; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350 ["Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement"].)

Under the parental visitation exception in section 366.26(c)(1)(B)(i), parental rights will not be terminated and a child freed for adoption if the parent has "maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship." (Italics added.) A juvenile court applies the parental visitation exception using a two-prong analysis. (*In re Aaliyah R.*, *supra*, 136 Cal.App.4th at pp.

449-450.) Under the first prong, the juvenile court determines whether there has been regular visitation and contact between the parent and child. (*Id.* at p. 450.) Under the second prong, the juvenile court determines whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination. (*Ibid.*) The parent/child relationship must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

The visitation exception does not apply when a parent fails to occupy a parental role in his or her child’s life. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51 [parents who have essentially never had custody of children or advanced beyond supervised visitation will have a difficult time establishing the former section 366.26(c)(1)(A) exception].) To establish the parental visitation exception, “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.]” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) A relationship sufficient to support the visitation exception “aris[es] from day-to-day interaction, companionship and shared experiences.” (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

Whether the exception applies is determined “on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the

variables which logically affect a parent/child bond.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) A parent must show that he or she has maintained regular visitation and contact with the child and that a benefit to the child would result from continuing the relationship. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 821; *In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809.)

At the section 366.26 hearing, apart from the offer of proof made in connection with mother’s request that the matter be set for a contested hearing, mother’s attorney did not address the application of the section 366.26(c)(1)(B)(i) parental visitation exception to the termination of parental rights. Apparently in response to mother’s offer of proof, the Department’s attorney argued that the exception did not apply because “mother is inconsistent. She sporadically maintains contact with the child and has been in and out of the juvenile hall and hasn’t cared for this child on a regular basis, provided a parental role.” The juvenile court ruled that the exception did not apply.

There is substantial evidence to support the juvenile court’s conclusion that mother failed to meet her burden of establishing that the parental visitation exception to the termination of her parental rights applied. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809.) Mother failed to show that her relationship with Brian promoted Brian’s well-being to such a degree that it outweighed the well-being Brian would gain in a permanent home with Mr. S and Mr. D. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 229.) Further, mother failed to show that she occupied a parental role in Brian’s life. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350; *In re Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) A juvenile court may choose an option other than adoption only in “exceptional” circumstances. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) The evidence before the juvenile court did not demonstrate such exceptional circumstances.

The Department’s reports state that Mr. S. and Mr. D provided Brian with a loving, caring, safe, stable, and appropriate home. Brian was very active with his caregivers and responded well to their care and direction. Brian appeared to be well

cared for and happy, and was thriving and healthy. Brian was reported to be ahead in almost all areas of his development. Mother gave up custody to Brian shortly after his birth, and, although the record indicates that mother visited with Brian and maintained telephone contact with him, the visits never progressed beyond supervised visitation. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) During mother's visits with Brian, mother interacted appropriately with him, holding, nurturing, and caring for him. Mother appeared to love Brian and genuinely to want to care for him. Brian appeared to be comfortable in mother's arms and accepted her care. To establish the parental visitation exception, however, a parent "must do more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that the parent[] and child find their visits pleasant. [Citation.]" (*In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1108.) Accordingly, mother failed to show that severing her relationship with Brian would deprive Brian of a substantial, positive emotional attachment such that Brian would be greatly harmed. (*In re Autumn H.*, *supra*, 27 Cal.app.4th at p. 575; *In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 229.) Because there is sufficient evidence to support the juvenile court's determination that mother failed to satisfy the second prong of the two-prong section 366.26(c)(1)(B)(i) parental visitation exception, mother's contention that the juvenile court erred in failing to apply that exception fails. (See *In re Aaliyah R.*, *supra*, 136 Cal.App.4th at pp. 449-450.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, Acting P. J.

We concur:

KRIEGLER, J.

KUMAR, J.^{*}

*

Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.